SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-017914 05/30/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

ZIEGFIELD INC THOMAS M BAKER

v.

PHOENIX CITY, et al. JAMES H HAYS

MINUTE ENTRY

Pursuant to A.R.S §12-910(e) this court may review administrative decisions in special actions and proceedings in which the State is a party:

> The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

The scope of review of an agency determination under administrative review places the burden upon the Plaintiff to demonstrate that the agency's decision was arbitrary, capricious, or involved an abuse of discretion.[1] Only where the administrative decision is unsupported by competent evidence may the court set it aside as being arbitrary and capricious.[2] In determining whether an administrative agency has abused its discretion, the court reviews the record to determine whether there has been "unreasoning action, without consideration and in disregard for facts and circumstances; where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that

[1] *Sundown Imports, Inc. v. Ariz. Dept. of Transp,*, 115 Ariz. 428, 431, 565 P.2d 1289, 1292 (App. 1977); *Klomp v. Ariz. Dept. of Economic Security*, 125 Ariz. 556, 611 P.2d 560 (App. 1980).
[2] *City of Tucson v. Mills*, 114 Ariz. 107, 559 P.2d 663 (App. 1976).

an erroneous conclusion has been reached."[3] The reviewing court may not substitute its own discretion for that exercised by an administrative agency,[4] but must only determine if there is any competent evidence to sustain the decision.[5]

This matter has been under advisement and the Court has considered and reviewed the record of the proceedings from the administrative hearing, exhibits made of record and the Memoranda submitted.

In the case at hand, The City of Phoenix was issued two Notices of Intent to Suspend (hereinafter "Notice") the sexually oriented business (hereinafter "S.O.B.") license of Plaintiff. The first Notice, issued on May 14, 2002, alleged that Plaintiff violated Phoenix City Code (hereinafter "P.C.C.") §10-138(1)[6], which regulates S.O.B.'s featuring nudity or live performances. The Notice further alleged that on two occasions, employees (dancers) at Plaintiff's S.O.B. violated P.C.C. §10-148(A)(1) when they touched the clothed genitals of an undercover police officer. The Notice also alleged that employees at Plaintiff's S.O.B. were performing in a V.I.P. area in violation of P.C.C. §10-148(A)(8)[7], which mandates that employees may not perform in any location other than the clearly designated area. The second Notice, issued on June 18, 2002, alleged illegal touching pursuant to P.C.C. §10-148(A)(1), when an employee touched the clothed genitals and breasts of a female undercover police officer. Plaintiff filed an appeal of both Notices, which were consolidated, and an administrative hearing was held on September 3, 2002, before the City of Phoenix License Appeal Board. Both license suspensions (10 days for the first Notice, and 5 days for the second) were sustained and were ordered to run consecutively.

The first issue Plaintiff raises is whether the evidence presented at the administrative hearing supports a finding that Plaintiff violated P.C.C. §10-148(A)(1). P.C.C. §10-148(A) states:

> A sexually oriented business that features live persons who appear in a state of nudity or live performances that are characterized by the exposure of specified anatomical areas or by specified sexual activities shall be operated in accordance with the following regulations. **It is unlawful for a licensee or employee to knowingly fail to ensure compliance with the following:** [emphasis added]

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[3] *Tucson Public Schools, District No. 1 of Pima County v. Green*, 17 Ariz.App. 91, 94, 495 P.2d 861, 864 (1972), as cited by *Petras v. Arizona State Liquor Board*, 129 Ariz. 449, 452, 631 P.2d 1107, 1110 (App. 1981).

[4] *Ariz. Dept.of Economic Security v. Lidback*, 26 Ariz. App. 143, 145, 546 P.2d 1152, 1154 (1976).

[5] *Schade v. Arizona State Retirement System*, 109 Ariz. 396, 398, 510 P.2d 42, 44 (1973); *Welsh v. Arizona State Board of Accountancy*, 14 Ariz.App. 432, 484 P.2d 201 (1971).

[6] "The City Clerk shall suspend a license for a period not to exceed fourteen calendar days if she determines that the licensee, manager or an employee of the licensee has violated or is not in compliance with any of the following: subsections 10-133(A)(2), (3) or (4), section 10-136, subsection 10-141(C), sections 10-142, 10-143, 10-144, or **10-148**, or applicable provisions of the Phoenix Zoning Ordinance."

[7] Recodified as §10-148(A)(10) on April 18, 2003, which was after the memorandum was filed with this court.

> 1. No employee, using their hands or any other part of their body, may knowingly make contact with the female breasts of any person, or the anus or genitals of any other person while either person is located in the clearly designated area in which patrons may be present or upon a stage. No patron, using their hands or any other part of their body, while on the licensed premises, may knowingly make contact with the breasts of any female employee, or the anus or genitals of any employee. For purposes of this subsection, "contact" shall include contact that occurs through clothing or by means of any other object.

When reviewing the sufficiency of the evidence, an appellate court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact.[8] All evidence will be viewed in a light most favorable to sustaining a judgment and all reasonable inferences will be resolved against the appellant.[9] If conflicts in evidence exist, the appellate court must resolve such conflicts in favor of sustaining the judgment and against the appellant.[10] An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.[11] When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the judgment.[12] The Arizona Supreme Court has explained in *State v. Tison*[13] that "substantial evidence" means:

> More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.[14]

Plaintiff's argues that the sentence "*It is unlawful for a licensee or employee to knowingly fail to ensure compliance*"[15] is to be interpreted as *another* licensee or employee must "*knowingly fail to ensure compliance*" of his/her fellow performers. This logic is preposterous.

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[8] *State v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989); *State v. Mincey,* 141 Ariz. 425, 687 P.2d 1180, cert. denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); *State v. Brown*, 125 Ariz. 160, 608 P.2d 299 (1980); *Hollis v. Industrial Commission,* 94 Ariz. 113, 382 P.2d 226 (1963).

[9] *Guerra*, supra; *State v. Tison*, 129 Ariz. 546, 633 P.2d 355 (1981), cert. denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).

[10] *Guerra*, supra; *State v. Girdler,* 138 Ariz. 482, 675 P.2d 1301 (1983), cert. denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).

[11] In re: Estate of Shumway, 197 Ariz. 57, 3 P.3rd 977, review granted in part, opinion vacated in part 9 P.3rd 1062; *Ryder v. Leach*, 3 Ariz. 129, 77P. 490 (1889).

[12] *Hutcherson v. City of Phoenix,* 192 Ariz. 51, 961 P.2d 449 (1998); *State v. Guerra*, supra; State ex rel. *Herman v. Schaffer*, 110 Ariz. 91, 515 P.2d 593 (1973).

[13] SUPRA.

[14] Id. at 553, 633 P.2d at 362.

[15] P.C.C. §10-148(A).

A logical and simple reorganization of the wording of the city code clearly mandates that **any licensee or employee must comply with the code**. Here, the employees did not comply with P.C.C. §10-148(A)(1). After a careful review of the record, I find substantial competent evidence to sustain the decision of the License Approval Board of the City of Phoenix on this issue.

The second issue that Plaintiff raises is whether the evidence presented at the administrative hearing supports a finding that Plaintiff violated P.C.C. §10-148(A)(8).[16] P.C.C. §10-148(A)(8)[17] states:

> **No employee may perform in any location of the adult cabaret other than the clearly designated area in which patrons may be present or upon a stage.** No stage may overlap with the clearly designated area in which patrons may be present. In order to qualify as a stage for purposes of this paragraph, the area above the stage up to a height of six feet must be clearly visible at a height of five feet from all points within a contiguous area of one hundred fifty square feet located within the clearly designated area in which patrons may be present. [emphasis added]

Again, this issue concerns the sufficiency of evidence, and when the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the lower court.[18]. I find substantial competent evidence to sustain the decision of the License Approval Board of the City of Phoenix on this issue, for the Plaintiff's employees were not performing in the clearly designated areas as mandated by the city code.

The final issue is whether the performance location rule of P.C.C. §10-148(A)(8),[19] which requires that "No employee may perform in any location of the adult cabaret other than the **clearly designated area** in which patrons may be present or upon a stage," violates Plaintiff's state and federal guarantees of equal protection under the law. For the equal protection test to even apply, Plaintiff must show a different standard of conduct – disparate treatment – for two classes of businesses.[20] Once that has been established, the City needs to show that the city code serves an important government interest, and that the classification is substantially related to the achievement of the city's objective. Here, there are differing standards of conduct between certain classes of businesses in Phoenix, including S.O.B's. The

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[16] Recodified as §10-148(A)(10) on April 18, 2003, which was after the memoranda were filed with this court.
[17] *Id*.
[18] *Hutcherson v. City of Phoenix,* 192 Ariz. 51, 961 P.2d 449 (1998); *State v. Guerra*, supra; State ex rel. *Herman v. Schaffer*, 110 Ariz. 91, 515 P.2d 593 (1973).
[19] Recodified as §10-148(A)(10) on April 18, 2003, which was after the memoranda were filed with this court.
[20] *City of Tucson v. Wolfe*, 185 Ariz. 563, 917 P.2d 706 (Ariz.App. 1995).

government interest is clear – the city wants to prevent acts of prostitution. Here, the classification and differing standards are substantially related to the achievement of the city's objective, for the city's S.O.B. code is entirely directed at preventing unlawful sexual conduct and prostitution in those businesses.

Plaintiff argues that being prohibited from charging a patron, who has paid and entered the general seating area, an additional fee to sit in the more private V.I.P. section violates equal protection under the law, for Plaintiff would be unable to compete with businesses such as America West Arena and Bank One Ballpark. Plaintiff points out that these facilities are permitted to offer V.I.P. seating. First of all, Plaintiff's S.O.B. does not compete with either America West Arena or Bank One Ballpark, and Plaintiff's fear of competition from America West Arena and Bank One Ballpark is clearly unfounded. Secondly, P.C.C. §10-148(A)(8),[21] does not prohibit patrons from appearing at the cashier's counter and paying more for seats closer to the stage. This pricing/seating issue is misleading, for it is completely irrelevant to the case at hand. What concerns this court is that the V.I.P. section of Plaintiff's S.O.B. impedes the view of undercover police officers, and frustrates the city code's anti-prostitution rationale. The rule prohibiting performances from occurring in a location other than the clearly designated area, or upon a stage, serves a substantial governmental interest, and is neither arbitrary nor unfounded.

IT IS ORDERED affirming the decision of the License Approval Board of the City of Phoenix.

IT IS FURTHER ORDERED DENYING all relief as requested by the Plaintiffs in their complaint.

IT IS FURTHER ORDERED that counsel for the Defendant shall prepare and lodge a judgment consistent with this minute entry opinion no later than July 8, 2003.

[21] Recodified as §10-148(A)(10) on April 18, 2003, which was after the memoranda were filed with this court.